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In the Supreme Court of the United States

MICHAEL J. BROWN, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Merit Systems Protection Board that the agency had established a sufficient nexus between the employee's misconduct and the promotion of the efficiency of the service was supported by substantial evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 229 F.3d 1356. The opinion of the Merit Systems Protection Board (MSPB or Board) (Pet. App. 27a-34a) is reported at 83 M.S.P.R. 230. The initial decision of the MSPB administrative judge (Pet. App. 35a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2000. A petition for rehearing and rehearing en banc was denied on December 28, 2000 (Pet. App. 26a). The petition for a writ of certiorari was filed on March 28, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, Michael J. Brown, was removed by the Department of the Navy from his position of Program Manager, Morale, Welfare and Recreation Department (MWR), Operations Division, Camp Lejeune, North Carolina, for misconduct. Pet. App. 1a-2a. Mr. Brown was found to have engaged in an inappropriate personal relationship with the wife of one of the Marine Corps officers from one of the units he was charged to support. *Ibid.* The decision to remove him was based on the finding that this conduct had jeopardized the trust, credibility, and integrity essential to Mr. Brown's effective job performance. *Id.* at 4a-8a.

In his capacity as an MWR program manager, petitioner coordinated activities to provide support for deployed Marines and their families. Pet. App. 4a. Petitioner planned, developed, and coordinated recreational and leisure time activities and other MWR events designed to contribute to the mental well-being of the participants. *Id.* at 4a-5a. The participants were active-duty Marines and sailors as well as their dependents. *Ibid.* Petitioner worked closely with commanders and their staffs as well as Marine spouses to fulfill his support role. *Id.* at 5.

Colonel Stewart, Assistant Chief of Staff, MWR Division, decided to remove petitioner from service based upon his determination that petitioner's misconduct interfered with petitioner's responsibilities to assist deployed Marines because those responsibilities required "that his interaction with Marines be founded on trust, respect and confidence." Pet. App. 44a. Colonel Stewart further found that as a result of petitioner's misconduct, petitioner had "lost his credibility, integrity and ability to function with" the Marines and

their families. *Ibid.* Because petitioner's misconduct had interfered with his ability to interact with Marines and their families, Colonel Stewart decided that it compromised petitioner's ability to perform his assigned mission. *Ibid.* Based on these findings, Colonel Stewart determined that petitioner's removal was necessary to promote the efficiency of the service. *Ibid.*

Petitioner filed an appeal with the MSPB. After conducting a hearing, the administrative judge found that petitioner had engaged in the alleged misconduct and that the agency had established the nexus between the misconduct and the efficiency of the service. Pet. App. 46a-47a. The finding of nexus was based upon the determinations that the misconduct adversely affected the agency's mission and management's trust and confidence in petitioner's job performance. *Ibid.* The administrative judge also determined that the penalty of removal was reasonable. *Id.* at 49a.

By order dated August 10, 1999, the full MSPB denied petitioner's petition for review of the initial decision because the petition failed to meet the criteria set forth at 5 C.F.R. 1201.115. Pet. App. 27a. Accordingly, the initial decision became the final decision of the Board. See 5 C.F.R. 1201.113(b).

The court of appeals affirmed the decision of the Board (Pet. App. 1a-25a). The court held that substantial evidence supported the Board's finding of a nexus between petitioner's misconduct and "both the mission of his agency in general and his job responsibilities in particular." *Id.* at 7a. The court repeatedly noted that misconduct such as petitioner's would not provide sufficient basis for disciplinary action in many other situations, but that the circumstances of petitioner's position and the role of the MWR department provided the necessary nexus. *Id.* at 7a, 11a. The court also

noted that, absent a mistake of law regarding the test to apply in reviewing nexus determinations, its review of the case was limited and that the Board's decision must be affirmed if supported by substantial evidence. *Id.* at 3a.

Writing in dissent, Judge Linn took the view that the Board's determination of nexus was not supported by substantial evidence. Pet. App. 14a. Specifically, Judge Linn regarded the evidence in support of the effect of petitioner's misconduct upon the trust and confidence of his supervisors to be "conjectural, speculative, or unrelated to petitioner's actual job responsibilities." *Id.* at 16a. Judge Linn also believed the Board's and the majority's focus upon the mission of the MWR department, rather than the Navy as a whole, to be legally erroneous. *Id.* at 20a-21a.

ARGUMENT

The court of appeals correctly determined that the Board's decision was supported by substantial evidence. Petitioner fails to raise a legal question of general importance and there is no conflict among the courts of appeals on the matter. Therefore, further review is not warranted.

The scope of review of Board decisions is established by statute and is extremely limited. Pursuant to 5 U.S.C. 7703(a), the courts of appeals must affirm decisions of the MSPB unless they are "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. 7703(c). See *Oshiver* v. *OPM*, 896 F.2d 540, 541 (Fed. Cir. 1990); *Cheeseman* v. *OPM*, 791 F.2d 138, 140 (Fed. Cir. 1986), cert. denied, 479 U.S. 1037 (1987);

Hayes v. *Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984). The court of appeals will not overturn an MSPB finding of nexus if it is supported by substantial evidence, *i.e.*, "such relevant evidence as might be accepted by a reasonable mind as adequate to support the conclusion reached." *White* v. *United States Postal Serv.*, 768 F.2d 334, 336 (Fed. Cir. 1985).

The court of appeals in this case found that the MSPB's decision was supported by substantial evidence. Specifically, the court found that the testimony of petitioner's superiors and co-workers provided ample basis for the Board's determination that the agency had shown the necessary nexus between petitioner's misconduct and his job responsibilities. Pet. App. 7a.

Petitioner first asserts that his petition should be granted because the issue regarding the nexus standard is an important one. The nexus standard is important, but the decision by the Federal Circuit did not alter the established test in any way. As the Federal Circuit has repeatedly held, to establish nexus, an agency must demonstrate that the employee's misconduct so interferes with the efficiency of the service that the employee must be removed. See, *e.g.*, *Brook* v. *Corrado*, 999 F.2d 523, 527 (Fed. Cir. 1993); *Allred* v. *Department of Health & Human Servs.*, 786 F.2d 1128, 1130 (Fed. Cir. 1986). That nexus requirement necessarily depends on context and the facts and circumstances of each case. In this case, the court of appeals determined that the Board's finding of nexus was supported by the testimony of petitioner's co-workers regarding the effect of his misconduct on the mission of the MWR department and the testimony of supervisors that Marine commanders would no longer allow their unit personnel to work with petitioner because of his misconduct. Pet. App. 5a-7a. The premise of peti-

tioner's assertion that the decision by the Federal Circuit impermissibly expands the scope of activities which may warrant removal is incorrect. The nexus standard does not focus upon the nature of the misconduct itself. Rather, the standard requires an agency to establish a connection between the misconduct and the mission of the agency or the employee's job responsibilities. See, *e.g.*, *Brook*, 999 F.2d at 527 (electrical technician's conviction for illegal drug possession jeopardized management's trust and confidence in technician's ability to maintain critical electrical systems). The court of appeals recognized that petitioner's misconduct would not warrant removal in many other employment situations. Pet. App. 7a. The court found, however, that petitioner's position as an MWR program manager required that he provide support to Marines and their families whose trust and confidence in petitioner—essential to his effective job performance—was jeopardized by his misconduct. *Ibid.* Accordingly, the court properly affirmed the Board's finding of nexus.

Petitioner next argues that the petition should be granted because the court of appeals decided the case incorrectly by affirming the Board's finding of nexus based, in part, upon management's loss of trust and confidence in his performance ability. Pet. 11-15. Petitioner also argues that there was no evidence presented concerning the impairment of petitioner's future job performance. Pet. 15. Despite petitioner's protests, the Federal Circuit has repeatedly held that management's loss of trust and confidence provides ample basis for a nexus determination. See, *e.g.*, *Brook*, 999 F.2d at 527; *Allred*, 786 F.2d at 1131. The Federal Circuit and other courts have also held that the agency need not wait until the expected effect upon job

performance or agency mission occurs before removing the employee. See, *e.g.*, *Brook*, 999 F.2d at 527 ("Entrusting to a convicted drug dealer unsupervised control over the entire Goddard electrical system and potential responsibility for the safety of persons and equipment could seriously undermine the public's confidence in the agency's ability to perform its mission. NASA need not wait until Mr. Corrado makes a mistake on the job before removing him."); *Wild* v. *HUD*, 692 F.2d 1129, 1133 (7th Cir. 1982) (HUD not required to continue employing appraiser publicly known to be moonlighting as a "slumlord" until it can conclusively prove actual job performance deficiency; employee's off-duty conduct that is fundamentally incompatible with agency's public duty sufficiently establishes harm to the credibility and effectiveness of the agency); *Giles* v. *United States*, 553 F.2d 647, 650 (Ct. Cl. 1977) (testimony of supervisor that IRS employee's failure to file timely tax returns would have a deleterious effect sufficient to establish nexus).

In addition, petitioner's assertion that there was no evidence presented regarding the effect of his misconduct upon his job performance is simply incorrect. A commander from one of the units petitioner was responsible for supporting and the deciding official both testified that commanders would no longer use petitioner's services, causing a loss of efficiency for both MWR and the deployed Marine units. Pet. App. 5a-6a. The deciding official also testified that petitioner's misconduct had jeopardized the credibility and integrity petitioner needed to perform his job adequately. *Id.* at 44a. That testimony and the underlying determination of nexus are not, as petitioner contends, "unsupported, general assertions that such action is necessary to maintain the public confidence." Pet. 15,

18 (quoting *Bonet* v. *United States Postal Serv.*, 661 F.2d 1071, 1076 (5th Cir. 1981)). Instead, this testimony provided a proper basis for the Board's nexus determination and the court of appeals' affirmance of that determination. Pet. App. 44a; see *Allred*, 786 F.2d at 1131 (statements of subordinates in support of employee were not sufficient to overcome fact that direct supervisors had lost trust and confidence).

Petitioner also criticizes the decision because the court recognized that the social mores of the group petitioner was required to serve could properly be considered in evaluating the agency's demonstration of nexus. Pet. App. 11a. This recognition is reflected throughout the cases relied upon by petitioner. For example, if a Customs officer failed to file his tax returns in a timely manner, it might not be cause for removal from the Customs Service. A tax auditor, however, could be removed from the Internal Revenue Service for such an infraction. See *Giles*, 553 F.2d at 649. Similarly, a conviction for illegal drug use in off-duty hours may not provide the same justification for removal of an Internal Revenue Service employee as for a Customs officer who is charged with enforcing the nation's drug laws. See *Masino* v. *United States*, 589 F.2d 1048, 1056 (Ct. Cl. 1978). In this case, the court properly recognized that petitioner served the Marine community at Camp Lejeune and that his misconduct jeopardized his ability to provide services to that community. Pet. App. 11a.

Although petitioner does not raise the argument in his petition, Judge Linn's dissent took the view that the Board's and the majority's focus in the nexus analysis on the mission of the MWR department, rather than the mission of the Navy as a whole, constituted legal error. See Pet. App. 20a-21a. Judge Linn's opinion is based on

the absence of any case law in which "the mission of a unit smaller than the agency was considered." *Id.* at 20a. Judge Linn's criticism of the majority's analysis is not persuasive in the context of this case, however. Unlike many agencies in which the sole mission of the agency is to serve the public at large, the military services also have an important duty to care for and support the service men and women who carry out the agency's broader military mission. This fact is reflected in the court's determination that the MWR department's mission was to support service men and women on deployment as well as their families. *Id.* at 46a. Thus, the court of appeals and the Board properly focused on the role and mission of the MWR department rather than the mission of the Navy as a whole.

Finally, petitioner argues that the Federal Circuit's decision in this case creates a conflict among the circuits with regard to the scope of the nexus test. The scope of the nexus test set forth in the decision below is in accord with the Federal Circuit's prior precedents as well as those in other circuits. There is no conflict to be resolved by the Court.

First, as petitioner recognizes, the Federal Circuit has exclusive jurisdiction to consider appeals of MSPB decisions, pursuant to 5 U.S.C. 7703(b)(1) (1994 & Supp. V 1999), unless the employee's challenge raises a claim of discrimination under an enumerated federal statute, see 5 U.S.C. 7702(a)(1), 7703(b)(2). Thus, another circuit would have occasion to consider the application of the nexus standard only if it were presented in an appeal from a United States district court case which also involves an issue of discrimination. See *Williams* v. *Department of the Army*, 715 F.2d 1485, 1491 (Fed. Cir. 1983) (en banc). On those rare occasions when other circuits do consider the issue of nexus,

the standard of review remains the same—namely, whether the agency's demonstration of nexus is supported by substantial evidence in the record. See, *e.g.*, *Morales* v. *MSPB*, 932 F.2d 800, 802 (9th Cir. 1991) (in "mixed" cases involving both discrimination claims and civil service claims, the nondiscrimination claims are reviewed on the administrative record pursuant to 5 U.S.C. 7703(c)).

Second, contrary to petitioner's argument, there is no conflict among the circuits regarding the proper application of the nexus standard. In all the cases cited by petitioner, the courts clearly stated that an agency must demonstrate that the adverse action taken against the employee will promote the efficiency of the service, as required by 5 U.S.C. 7513(a). See, *e.g.*, *D.E.* v. *Department of the Navy*, 721 F.2d 1165, 1166, amended, 722 F.2d 455 (9th Cir. 1983). Then, in each of the cases, the court examined the nature of the evidence presented to the Board and determined whether it constituted "substantial evidence" to support the agency's nexus determination or the Board's decision that nexus had been established. See, *e.g.*, *Gloster* v. *GSA*, 720 F.2d 700, 705 (D.C. Cir. 1983) (nexus between employee misconduct underlying discharge and service efficiency not established by record evidence).

Similarly in this case the court of appeals recited the necessary showing for nexus and then conducted a review of the evidence presented to the Board. Pet. App. 3a. Based upon the testimony of the five agency witnesses and the evidence in the record regarding the job responsibilities of an MWR program manager, the court found that the agency's showing of nexus was supported by substantial evidence and affirmed the decision of the MSPB on this basis. *Id.* at 7a. The nexus requirement necessarily requires the Board to

engage in a fact-specific analysis that depends on the nature of the individual employee's responsibilities. Courts of appeals then review the Board's determination deferentially. The resulting decisions, like this one, tend to be highly fact-dependent and do not lend themselves to this Court's review.

At bottom, this petition for a writ of certiorari is based solely on a different view of the evidence presented to the Board regarding the nexus between petitioner's misconduct and the efficiency of the service. Petitioner's disagreement with the decision of the MSPB and the court of appeals' view of the evidence does not provide an adequate basis for further review of this case by the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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